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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, INDIVIDUALLY AND IN HER CAPACITY AS REPRESENTATIVE OF JAMES EARL GREEN, DECEASED, ET AL.,
Petitioners,

VS.

WILLIAM L. WALLER, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, STATE DEFENDANTS

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SEPARATE BRIEF FOR RESPONDENTS, STATE OF MISSISSIPPI AND ITS EMPLOYEES IN OPPOSITION

This brief in opposition to the Petition for a Writ of Certiorari herein is filed on behalf of the Respondents, State of Mississippi; Giles Crisler, Mississippi Commissioner of Public Safety; and, thirty-nine individual officers of the Mississippi Highway Safety Patrol.

OPINION BELOW

A copy of the opinion delivered in the Court below is attached to the Petition herein as Appendix C.

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1). Reliance upon this section is misplaced. Rule 19 of the Supreme Court Rules, concerning the grant of certiorari, embodies the criteria by which the Court determines whether a particular case merits consideration, with due regard to the power to which the Court is confined, decisively restricted through the creation of the intermediate Court of Appeals. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Special and important reasons which may justify the grant of a writ of certiorari under Rule 19 imply a reach to a problem beyond the academic or the episodic; this does not exist here where review is sought of the evidence and inferences drawn from it. The Supreme Court has held that it would not grant a writ of certiorari for such purposes. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938). Jurisdiction should be denied.

QUESTIONS PRESENTED

The statement by Petitioners as to the questions presented is an inaccurate and misleading continuum which these Respondents reject out of hand. This is nothing more than an attempt by Petitioners to retry this case in this Court. Such a course is violative of the Seventh Amendment to the Constitution of the United States.

The only question before this Court in this tort action is:

Whether a jury verdict exonerating from liability all the named Defendants and upheld by the Court of Appeals is to be overturned as a matter of law.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Seventh Amendment hereinafter set forth:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

The complained of events which resulted in the bringing of this action have been "untangled as painstakingly as we are able" (502 F.2d 1265) by the Court of Appeals for the Fifth Circuit and are set forth in its opinion, pages 1266-1270. It could serve no useful purpose to reiterate isolated facts here inasmuch as the dispositive issues are drawn from a more general overview.

The president of Jackson State described the scene which confronted those charged with the responsibility of keeping the peace, the Defendants, as they entered the campus to fulfill their responsibility:

> "On Yesterday evening, May 13, we had another what has become [sic] the annual riots at Jackson State College. This latest riot was perpetrated by a face-

> less, mindless mob of students and non-students bent on doing violence and destruction to the college and doing bodily harm to our own counselling personnel as well as to unsuspecting passersby. Considerable damage was done to the college property, mainly in the form of glass breakage. Two trailers used to haul garbage from dormitories and the dining hall were burned. Also a very determined attempt was made to incinerate Barracks 1-A . . . ." 502 F.2d 1268.

That there was a "riot" on the campus of Jackson State has not been denied. That these particular Respondents, along with numerous city, county and federal officers, went to the campus and joined hands with campus security officers for the purpose of quelling that riot is not contested. That the Petitioners were injured during the ensuing confrontation between the many law enforcement officers present, including these Respondents, and rioters is a rational inference. That no Petitioner suffered at the hands of these Respondents, or any of them, is the jury's verdict, supported by ample evidence. That other officers present were not parties to this suit was a choice exercised for reasons best known to Petitioners.

The culmination of the two nights of rioting, that had left extensive property damage at the hands of the rioters, was less than half a minute's duration. The Court of Appeals recounted it thusly:

> "Shortly after the contingent had halted and when the crowd in the courtyard numbered about 400 students, a sound resembling the report of a small caliber pistol was heard. There is sufficient evidence, in the form of testimony by many officers and by newsmen, from which the jury could find that at that time the officers were fired upon by a sniper, thus hereinafter we state as fact that a sniper existed and that he fired.

A newsman who was in the area testified: 'Shortly after we arrived I began shooting film, and it was soon after that I felt a bottle shatter at my foot, sprayed my ankle with glass. I heard a report; a bullet went past my ear and I heard it ricochet off the wall behind me.' An MHP officer testified that he saw a black male break out the western pane of the third window from the bottom of West Wing of Alexander Hall, and fire two shots in his direction from a handgun. At least 18 patrolmen testified to seeing two or three muzzle flashes come from the eastern pane of the same window. Other patrolmen saw muzzle flashes in either one of the upper windows or at the top of Alexander Hall, and a score of additional policemen and patrolmen heard shots from the general vicinity of Alexander Hall. At or about this time a patrolman and a JPD officer were struck by thrown bricks and knocked down.

Several patrolmen or policemen cried 'sniper' or 'sniper third floor' or 'sniper third window.' " 502 F.2d 1269-70.

At page 12 of the Petition the absurd statement is made that "any testimony about a sniper cannot be credited." This flies in the face of the position of the Petitioners taken in the Court of Appeals. That Court in its opinion in footnote 3 stated, "Plaintiffs concede that the jury could so find 'that at that time the officers were fired upon by a sniper,' thus hereinafter we state as fact that a sniper existed and that he fired." 502 F.2d 1269.

The FBI made an exhaustive investigation of the Jackson State shootings and detailed study of the effects of the barrage. 502 F.2d 1271. The testimony of the FBI agents set forth the results of that investigation and established that the firing originated "where the MHP patrol-

men had been clustered." Id. Thus, the testimony of these Respondents was corroborated as to their direction and plane of fire and the practical impossibility of their having injured the Petitioners.

It should be noted that with respect to the seven specific Defendants which the Court of Appeals singled out for whatever reason, even these seven Respondents were exonerated by the jury and this was found proper. 520 F.2d 1282. Specifically, the Court of Appeals said, "The proof did not establish as a matter of law that any one or more of them [the seven singled out] inflicted the harm suffered by any one or more of the victims whose claims are before us." Indeed, it could have been no other way for, by the uncontradicted testimony of these particular officers, shots fired by them could not have caused any of the injuries complained of with the possible exception of the Petitioner, Tuwaine Davis Whitehead, who places herself in the position of the sniper. There simply is a void in the evidence as to any "causation."

It appears to be the position of Petitioners that since certain of these Respondents fired their weapons on the night in question and that inferentially these Petitioners were injured on that night then, *ipse dixit*, these Respondents are liable in damages regardless of whether or not they were the proximate cause of the injuries complained of by the Petitioners. It should here be noted that as previously pointed out the record shows that there were many other law enforcement officers present on the night in question who were equipped with firearms and were in a position to and had an opportunity for causing the complained of injuries. None of these individuals was made a party Defendant in this action. Moreover, the record reflects that individuals other than law enforcement officers were on the campus armed with firearms and firing them.

Furthermore, twenty city policemen and four Highway Patrolmen who were made party Defendants and who were present and armed with firearms of an identical nature as those of these Respondents were voluntarily dismissed with prejudice by the Petitioners upon their mere assertion that they had not fired their weapons at the time in question. This dismissal was effected even though these individuals so armed were in a position and had an opportunity to have caused the complained of injuries. It is incongruous that while Petitioners accepted the unsupported assertions of these twenty-four individuals they now characterize the testimony of these Respondents given under oath and subject to cross examination as being devoid of the truth.

On page 10 of the Petition, Petitioners attempt to mislead this Court by implying that the Petitioners proved their case by offering the testimony "of 96 witnesses, including eleven Jackson State students and 69 officers at the scene." This is an obvious attempt to mislead this Court since Petitioners do not inform the Court that the sixty-nine officers were in fact the Defendants in this action including the remaining Respondents who were called as adverse witnesses. None of these sixty-nine officers testified in any manner which would in any way support the position of the Petitioners. As proof that this was not just an innocent mistake on the part of Petitioners they add a footnote telling this Court that "Defendants offered the testimony of only two witnesses, who added little, if anything, to the testimony previously presented by the Plaintiffs." This statement could only have been made to willfully mislead this Court since the writer of this Petition knew that all of the Defendants testified in their own behalf and in support of their defenses after being examined by Petitioners. This was done in the interest of judicial economy and with the approval of the trial court

rather than recalling each of them after the close of the Plaintiffs' case.

At page 2 of their Petition, the Petitioners make reference to "an all-white jury" apparently implying the absence of blacks on the venire from which the panel was selected. This simply is an untruth; there were numerous blacks among the venire from which the trial jury was selected. In any event, "race" is not at issue here for, while the insinuation is made in the Petition, the trial jury was never challenged. Moreover, the Petitioners moved the trial court for a change of venue from the Jackson Division of the United States District Court for the Southern District of Mississippi, where the incident occurred and the majority of the parties reside, and which has a black-white ratio of 40-60 according to the 1970 census. The change of venue was granted over the objection of the Respondents.

Perhaps, the more succinct statement of this case is that made by the Court of Appeals as its "Conclusion."

> "We summarize the key points controlling ultimate disposition of this case. There was evidence on which the jury could find there was sniper fire and plaintiffs so concede. Under the governing Mississippi law of privilege, and with respect to most of the officers who fired, there was sufficient evidence to submit to the jury as to whether the respective officers were privileged to fire in self defense or to suppress a riot, and, if privileged, whether nevertheless they employed excessive deadly force or fired without due regard to the safety of others. With respect to a few officers, the evidence established that they were guilty of tortious conduct as a matter of law, but the question of whether any one or more of them was an actual cause of harm to any plaintiff was for the jury. Liability of supervisory and command officers was a jury issue. The

State of Mississippi and the City of Jackson were immune from suit. There was no error in the jury charges.

Our conclusions make it unnecessary for us to discuss questions concerning assumption of risk, alleged immunity of individual officers from suit, and alleged liability of Crisler on respondeat superior grounds for tortious acts of individual officers.

This case was correctly submitted to the jury for decision. The jury has spoken, and the judgment entered on its verdict must be and is affirmed." 502 F.2d 1286.

ARGUMENT

The Supreme Court of the United States, speaking through Mr. Justice Douglas, in *Atlantic and Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed. 2d 798 (1962), correctly stated the proposition which is now urged upon the same Court by these Respondents:

> "We might agree with the Court of Appeals had the questions of the fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'" 369 U.S. 359-60.

The position adopted by the Petitioners, and rejected by the District Court and Court of Appeals, would have the Court "search for one possible view of the case which will make the jury's finding inconsistent." 369 U.S. 364.

Such a position "results in a collision with the Seventh Amendment." Id.

In accord with this teaching of *Atlantic and Gulf Stevedores,* we point out that the Court of Appeals after "painstaking" inquiry found that: "This case was correctly submitted to the jury for decision." 502 F.2d 1286.

In *Lavender* v. *Kurn*, 327 U.S. 645, 90 L.Ed. 916 (1946), this Court was asked to review evidence and draw inferences contrary to those drawn by a jury. In answer to that request the Court responded thusly:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citations Omitted).
>
> It is no answer to say that the jury's verdict involved speculation and conjecture." 327 U.S. 652-53.

In the case sub judice, as in *Lavender,* the Petitioners would have this Court review the evidence toward the end of drawing inferences more to their liking. The short answer to such a request must be that they are "not free to relitigate the factual dispute in a reviewing court."

IMMUNITY

Petitioners have made much ado over an imagined issue as to the vitality of the Eleventh Amendment to the Constitution of the United States. While the Respondents do not recognize this as an issue it is nevertheless ad-

dressed to further allay any possible question as to the proper disposition of the Petition.

The trial court allowed the issue of the State's liability to these Petitioners to go to the jury reserving a ruling on the question of immunity until their decision was reached on liability. It was after the jury returned its verdict of no liability that the trial court correctly held the State to be immune.

The Court of Appeals cited more than ample authority for the immunity of the State and a listing here is unnecessary. 502 F.2d 1273-74.

CONCLUSION

Upon the facts presented in this case a jury has laid to rest the riots of 1970, therefore, this Court should not exhume them through the office of certiorari. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

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